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In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 356.

JILLO BYNUM, LONNIE LEWIS and ROBERT MULLINS,
Petitioners,

vs.

THE FIRESTONE TIRE & RUBBER COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND TO THE SUPREME COURT OF TENNESSEE.

BRIEF FOR RESPONDENT.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE AND TO THE SUPREME COURT OF TENNESSEE.

BRIEF FOR RESPONDENT.

ACTION OF THE COURTS BELOW.

The suit was originally instituted by petitioners in the Chancery Court of Shelby County, Tennessee, to recover of respondent minimum wages, overtime compensation, liquidated damages and attorney's fees alleged to be due them under the provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Sec. 201, *et seq.*).

The trial court, upon the hearing of the cause, dismissed the suit upon the ground that the petitioners were employees of a retail and service establishment, the greater part of whose selling and servicing was in intrastate commerce within Section 13 (a) (2) of the Fair Labor Standards Act of 1938 (29 U. S. C. A. Sec. 213 (a) (2)), and that petitioners were, therefore, not covered by Sections 6 and 7 of the Act (29 U. S. C. A. Secs. 206, 207) (R. 35).

The petitioners perfected a limited appeal to the Court of Appeals of Tennessee, challenging the action of the trial court in so holding (R. 46, 47, *et seq.*).

Respondent also perfected an appeal to the Court of Appeals of Tennessee from so much of the decree of the trial court as further adjudged that the activities of petitioners in changing and mounting tires at respondent's store and service station in Memphis, Tennessee, upon trucks of interstate carriers of commerce constituted engaging in commerce within the purview of the Act; and appealed further from so much of the decree as failed to adjudge that the petitioners were employees employed in a bona fide local retailing capacity within Section 13 (a) (1) of the Act (29 U. S. C. A. Sec. 213 (a) (1)) (R. 47, *et seq.*).

Respondent filed in the Court of Appeals two assignments of error asserting that the petitioners were not thus engaged in interstate commerce, and that they were employees employed in a bona fide local retailing capacity within the meaning of the Act (R. 227).

The Court of Appeals of Tennessee affirmed the action of the trial court in dismissing the suit upon the ground that the establishment exemption provided in Section 13 (a) (2) of the Act was applicable, petitioners being therefore excluded from coverage under the Act (R. 191).

The Court of Appeals having thus determined adversely the petitioners' claim, upon the ground that the establishment exemption applied, it felt there was no necessity of considering respondent's assignments of error (R. 196).

Petitioners filed in the Supreme Court of Tennessee a petition for a writ of certiorari, challenging the action of the Court of Appeals in holding that the respondent's store and service station was an exempt retail establishment within Section 13 (a) (2) of the Act (R. 196).

Respondent also filed in the Supreme Court of Tennessee a petition for a writ of certiorari, again asserting

that the petitioners were not engaged in interstate commerce, in the production of goods for interstate commerce, or in any process or occupation necessary to the production of goods for interstate commerce within the Act (R. 233); and that petitioners were engaged in an exempt local retailing capacity.

The Supreme Court of Tennessee denied both petitions for certiorari, without opinion (R. 222).

The judgment and decree of the Court of Appeals was therefore final (Ch. 100 of the Public Acts of Tennessee of 1925).

Neither the Court of Appeals nor the Supreme Court of Tennessee has passed upon the question of the petitioners' non-engagement in interstate commerce, nor upon the issue as to whether they were employed in a bona fide local retailing capacity. Moreover, the denial of the petitions for certiorari by the Supreme Court of Tennessee should not be taken as affirming the reasoning of the trial court as to the defenses that the petitioners were not engaged in interstate commerce, or that the petitioners were employed in a local retailing capacity. (See *Lingner v. Lingner,* 165 Tenn. 525; 56 S. W. (2d) 749 (1933), criticizing and limiting *Beard v. Beard,* 158 Tenn. 437; 14 S. W. (2d) 745 (1929).)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 937 (28 U. S. C. A. Sec. 344 (b).)

QUESTIONS PRESENTED.

The petition for writ of certiorari indicates that the only question presented to this Court is whether the respondent's store and service station was a "retail establishment" under Section 13 (a) (2) of the Fair Labor Standards Act of 1938.

In fact, however, there have been involved from the beginning of the action, and there are now involved in this Court three distinct questions as follows:

1. Whether the petitioners as employees were engaged in interstate commerce within the meaning of the Fair Labor Standards Act, Sections 6 and 7 (29 U. S. C. A. Secs. 206-207).

2. Whether the petitioners, if so engaged in interstate commerce, were exempt because engaged in a retail or service establishment, a greater part of whose selling or servicing was in intrastate commerce, Section 13 (a) (2) (29 U. S. C. A. 213 (a) (2).)

3. Whether petitioners, if engaged in interstate commerce and if engaged in an establishment covered by the Fair Labor Standards Act, were exempt under the provisions of Section 13 (a) (1) of the Act (29 U. S. C. A. 213 (a) (1)), as employees engaged in "a bona fide * * * local retailing capacity * * * (as such terms are defined and delimited by the Administrator)."

STATUTES INVOLVED.

29 U. S. C. A. Sections 206 and 207 provide in part:

> "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * *"
>
> "No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * *"

thereafter fixing the maximum hours of work beyond which premium payments are required.

29 U. S. C. A. Section 202 (b) provides:

> " 'Commerce' means trade, commerce, transportation, transmission, or communication among the sev-

eral States or from any State to any place outside thereof."

29 U. S. C. A. Section 213 (a) (2) also provides in part:

"The provisions of Sections 206 and 207 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce;"

29 U. S. C. A. Section 213 (a) (1) is in part:

"The provisions of Sections 206 and 207 shall not apply with respect to (1) any employee in a bona fide * * * local retailing capacity * * * (as such terms are defined and delimited by regulations of the Administrator);"

29 U. S. C. A. Section 216 (b) provides in part as follows:

"Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages * * *. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

REGULATION INVOLVED.

The only official Administrative Regulation in this case, having the force and effect of law and promulgated pursuant to the express direction of the Act, is the following:

"Section 541.4. *Local Retailing Capacity*—The term 'employees employed in a bona fide local retailing capacity' in Section 13 (a) (1) of the Act shall mean any employee,—

(A) who customarily and regularly is engaged in,—

(1) making retail sales the greater part of which are in intrastate commerce; or

(2) performing work immediately incidental thereto, such as the wrapping or delivery of packages, and

(B) whose hours of work of the same nature as that performed by non-exempt employees do not exceed 20% of the number of hours worked in the work-week by such non-exempt employees."

STATEMENT.

Petitioners are three former employees of Firestone Auto Supply and Service Store.

The Firestone store and service station, located at Washington Avenue and Third Street, Memphis, Tennessee, was and is a separate unincorporated establishment owned and operated by respondent. The store and service station is a wholly distinct business unit, physically apart, with its own books and bank account, and with supervisory control of its own employees (R. 93, 95, 96). Respondent also owns a Tennessee subsidiary, The Firestone Tire & Rubber Company of Tennessee, which is not a party to the present litigation. The store and service station buys merchandise and supplies from The Firestone Tire & Rubber Company of Tennessee and from independent sources (R. 95).

The store and service station maintained a stock (R. 91) of tires, tubes, bicycles, batteries, hardware, electrical accessories, radios and other commodities (R. 65, 91, 93) which were sold to its customers. Some of these products were manufactured by respondent—others by independent manufacturers (R. 95). The store and service station employees (except service station employees such as petitioners), as well as three or four outside salesmen, were furnished with sales books in which sales of the various

items carried were entered. Gasoline and oil were served from service pumps. No manufacturing, processing, or retreading of tires was carried on at the store and service station (R. 92). Some of the merchandise sold, particularly tires, was also serviced by the store and service station employees (R. 92). Some merchandise, gasoline and tires, was sold at a discount to purchasers in large volume, whether such purchasers were persons, companies, or dealers (R. 91). The greater part of the store and service station's business, however, was in sales to individuals (R. 91-96). The petition in this Court alleges (p. 11), and petitioners assert in their brief (p. 28), "25.2% of the number of transactions handled by said store are of a wholesale character" (R. 46). The basis of this allegation and assertion is said to be Defendant's Exhibit 7 (R. 153). The allegation and assertion are inaccurate, since Exhibit 7 refers only to "Transactions Other than Cash" (R. 107, 153)—that is, "charge" transactions (R. 107)—and has no reference to total transactions handled by the store and service station.

A detailed analysis of the dollar volume of the selling and servicing activities of the store and service station during the periods of petitioners' employment was prepared by Witness J. H. Laumer, Auditor for the store and service station. This analysis reveals that during the period of petitioners' employment 75.2 per cent to 84 per cent of the total sales made by the store and service station were sales for customer consumption and not for resale (R. 151, Dft's Ex. 2); that is,—in accordance with common understanding and sales language,—such sales were "retail" sales (R. 151). Additional analyses were prepared by this same witness to conform to the rulings of the Administrator of the Wage and Hour Division with respect to retail sales. The audit in that regard reveals that from October 24, 1938 (the effective date of the Fair Labor Standards Act), until September 30, 1940 (a date

subsequent to all employment periods in controversy), from 60.9 per cent to 71.3 per cent of the total sales made by the store and service station were retail sales within the purview of the Administrator's rulings (R. 100; Ex. 1, 150; 102; 114). From October 24, 1938 to September 20, 1940 (a date after which none of the petitioners was employed by respondent), less than four per cent of all the selling and servicing of the store and service station was for customers whose places of business were in another state. 96.7 per cent of all the selling and servicing during that period was unquestionably intrastate in character (R. 111; 117; Dft's Ex. 5, 152). All these dollar-volume analyses represented only one of the criteria in determining the retail nature and characteristics of respondent's business.

These employees were service-station help, whose jobs involved routine tasks about the place with infrequent errands of one sort or another. The record contains no definite statement as to the precise allocation of their working hours. There is in the record no clear evidence as to the extent to which petitioners participated in any interstate activity of respondent's establishment. The burden of proof was on petitioners to establish that participation in interstate commerce.

The work performed by the petitioners was principally in the servicing of automobiles, particularly changing and mounting tires. Most of their work was done on the premises of the store and service station (R. 94). In addition, petitioners made a few incidental deliveries and pickups of tires for repair, and also made service calls in the City of Memphis. For example, Petitioner Bynum made nine pickups in September, 1939 (R. 113, 141), and Petitioner Mullins made one pickup in September, 1939 (R. 113, 141). The time spent by petitioners in delivering tires and merchandise would average about two hours a day (R. 94, 95). Occasionally, a service delivery (which might include the mounting of a tire) was made just across the river in

Arkansas by an employee other than these petitioners (R. 90-96).

By appropriate proceedings in the trial court, in the Court of Appeals of Tennessee and in the Supreme Court of Tennessee, respondent contended that recovery should be denied petitioners on two grounds in addition to the exemption of Section 13 (a) (2) of the Act (R. 5, 22, 222, 227, 233). *First*, they were not engaged in commerce or in the production of goods for commerce. *Second*, they were employed in a bona fide local retailing capacity within Section 13 (a) (1) of the Act.

The appellate courts below either rejected or pretermitted such issues made by the respondent. The respondent in this Court, without filing a cross-petition, may therefore urge grounds rejected by the courts below in support of a judgment under review. *Helvering v. Lerner Stores Corp.*, 314 U. S. 463; *Langnes v. Green*, 282 U. S. 531, 539; *Texarkana v. Arkansas Louisiana Gas Co.*, 306 U. S. 188.

SUMMARY OF ARGUMENT.

It is the position of the respondent that no one of the petitioners, while working for respondent at its store and service station, was engaged in interstate commerce. (It is conceded by petitioners that none of them was actually engaged in the production of goods for commerce.) Respondent thus contends that the provisions of the Fair Labor Standards Act of 1938 do not therefore apply to or cover the petitioners' employment with respondent. Petitioners have wholly failed to satisfy the burden of proof in this regard.

Respondent further contends that (if it should be found that the petitioners were while in respondent's employment engaged in interstate commerce), in any event such employment was in a retail or service establishment, the greater part of whose selling or servicing was in intrastate commerce; and that their employment was therefore

specifically exempted from the Wage and Hour provisions of the Fair Labor Standards Act by Section 13 (a) (2) of such Act.

Respondent further contends, finally, that the petitioners themselves were engaged in a bona fide retailing capacity; and that their employment was therefore specifically exempted from the Wage and Hour provisions of the Fair Labor Standards Act by Section 13 (a) (1) of that Act.

ARGUMENT.

I. PETITIONERS WERE NOT ENGAGED IN INTERSTATE COMMERCE.

The provisions of the Fair Labor Standards Act of 1938 apply only to employees engaged in interstate commerce or in the production of goods for interstate commerce (29 U. S. C. A. 203 (b)). *Kirschbaum v. Walling*, 316 U. S. 517; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *McLeod v. Threlkeld*, 63 S. Ct. 1248.

The petitioners admit that they were not engaged in the production of goods for interstate commerce (see petition in this Court, page 6). Also, note petitioners' brief at page 39:

> "This action is not predicated upon any premise that the unit store herein was engaged in the manufacturing or production of goods, but based upon the fact that said store was engaged in selling, and at wholesale and retail, in interstate commerce and intrastate commerce."

Therefore, it is necessary in this case to determine only whether petitioners were "engaged in interstate commerce."

In making such determination "it is the work of the employee which is decisive," *McLeod v. Threlkeld, supra*, p. 1252; the burden is upon the employees (petitioners) to show what part of their work was in interstate commerce

as distinguished from that in intrastate commerce, *White Motor Company v. Littleton, et al.*, 134 F. (2d) 92 (C. C. A. 5th (1941)); *Super Cold Southwest Company v. McBride*, 124 F. (2d) 90 (C. C. A. 5th (1941)).

Under the Fair Labor Standards Act the employee, to become entitled to the benefits of the Act, must be actually in or so closely related to the movement of interstate commerce as to be a part of it. It is not sufficient that an employee's "activities affect or indirectly relate to such interstate commerce." As stated by this Court in *McLeod v. Threlkeld, supra*, at page 1251:

> "The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

And, there must be a substantial part of the employee's work which is in or closely related to interstate commerce, in order to bring him within the provisions of the Act (*Walling v. Jacksonville Paper Co., supra*, p. 572).

In determining the nature of petitioners' employment, it is necessary therefore to examine the character of their place of employment (respondent's store and service station) and also the nature of the business transacted by that store and service station.

The record discloses that the store and service station handled a variety of products, including such articles as radios, batteries, electrical accessories, and tires and tubes. The store and service station also sold gasoline (R. 65, 91, 93).

The record shows that at most, only 3.3 per cent of the sales and service volume of this store and service station was in interstate commerce, or more accurately—to customers with out-of-state addresses. But the record fails to show—and in this respect petitioners utterly failed

to sustain their burden of proof—to what extent, if any, petitioners participated in this limited amount of so-called interstate business of the establishment.

Although originally some effort was made by petitioners to show that some of the pickups and tire service work was done by petitioners in Arkansas, the trial court found (the Court of Appeals concurring) that petitioners' testimony in this regard was highly colored and exaggerated (R. 32, 38, 39, 195). Additionally, the record (R. 50, 56, 89, 90) shows that actually any delivery or tire service in Arkansas was made and done by one Thurston Starks. The trial court found that the petitioners had not established what part of their employment was spent in changing and mounting tires on vehicles which might be moving in interstate commerce, whether such work was done at respondent's store and service station or elsewhere (R. 32-38). It is clear therefore that petitioners have failed to establish that a substantial part of their work was in interstate commerce. (*Walling v. Jacksonville Paper Co., supra*; *Higgins v. Carr Bros. Co.*, 317 U. S. 572.)

Changing and mounting tires of an interstate vehicle at the Memphis store and service station or anywhere else in the State of Tennessee would in no event constitute an engagement by the petitioners in interstate commerce. Such work is not so closely related to interstate commerce as to be a part of it. *Walling v. Jacksonville Paper Co., supra; McLeod v. Threlkeld, supra.*

The only other claim made by petitioners for an engagement in interstate commerce is based upon occasional pickups of merchandise which were made by them at the Firestone Plant in Memphis. The merchandise so picked up was delivered by petitioners to the store and service station. Petitioners claim, since some of this merchandise was manufactured outside the State of Tennessee, it must follow that their work in picking up was in interstate commerce. The record is clear that such

pickups were wholly unconnected with any unbroken stream of commerce from the plant of The Firestone Tire & Rubber Company to any ultimate consumer. There was no practical continuity of movement from the manufacturer or supplier without the state through the plant and on to customers whose price orders, contracts or understanding were being filled. The merchandise so handled by petitioners had definitely come to rest at the Firestone Plant in Tennessee. *Walling v. Jacksonville Paper Co., supra*; *Higgins v. Carr Bros. Co., supra*; *Walling v. Goldblatt Bros. Inc.,* 128 F. 778, cert. den. 318 U. S. 757.

In the *Goldblatt* case, it was held that employees handling goods up to the time the goods arrived at the unloading platform of a wholesale warehouse were engaged in interstate commerce, but that thereafter such employees were not engaged in interstate commerce within the provisions of the Fair Labor Standards Act. This Court denied certiorari in the *Goldblatt* case, February 1, 1943, after the decision of *Walling v. Jacksonville Paper Co., supra,* and it would therefore seem that the ruling limiting the coverage of the Act up to the time goods arrive at the unloading platform has been approved by this Court. (See also, *Allesandro v. C. F. Smith Company,* 136 F. (2d) 75 (C. C. A. 6th, 1943).)

Furthermore, the record discloses that such pickups constituted a very small part of the work done by petitioners (R. 113, 141).

It appears therefore that the record discloses no basis upon which it can be said that these petitioners were engaged in interstate commerce within the meaning of the provisions of the Fair Labor Standards Act and the decisions of this Court. The courts below should have denied petitioners any recovery upon this ground; and while the suit was dismissed for reasons discussed under Point II of the Argument of this brief, it is nevertheless apparent that the actions of the courts below in dismissing the suit

were proper for the additional reason that petitioners failed to prove an engagement in interstate commerce.

II. PETITIONERS WERE ENGAGED IN A RETAIL OR SERVICE ESTABLISHMENT THE GREATER PART OF WHOSE SELLING OR SERVICING WAS IN INTRASTATE COMMERCE.

1. The Respondent's Business has the Characteristics of a Retail Establishment.

Respondent's store and service station was operated as a distinct unit or establishment, physically and administratively separate and apart from other activities of respondent. The store and service station maintained its own bank account, kept its own books and accounts and supervised and paid its own employees (R. 93, 95-96).

The merchandise and supplies bought by the store and service station from The Firestone Tire & Rubber Company of Tennessee (a separate corporation and not a party in this cause), from independent suppliers and other sources were billed to and paid by the store and service station in the same manner as an independent dealer (R. 93, 95-96).

Petitioners concede that the store and service station is to be considered as a unit, wholly unrelated to respondent's other activities (Petition p. 6).

Congress did not lay down criteria for determining what is or is not a retail establishment. It must be presumed that Congress used the words "retail establishment" in the ordinary business or common understanding of the term.

Sales factors are only one of the elements to be considered. A realistic consideration of the nature of the store and service station, the location in a retail neighborhood, the typical automobile-owner customer, the miscellaneous stock of goods (ranging from gasoline, automobile tires and accessories to children's toys) for indi-

vidual consumption, and the selling and furnishing generally of merchandise and service to the consuming public demonstrate the retail characteristics of this store and service station (R. 38, 65, 137).

The business of respondent's store and service station is a retail business, its goods are those ordinarily acquired by a local merchant primarily for local disposition. Its activities differ not at all from those of the corner store with service facilities, except in volume. Cf. *Allesandro v. C. F. Smith Co., supra*; *Walling v. Sanders, et al.*, 136 F. (2d) 78; C. C. A. 6th (1943).

Incidental service does not affect the character of the establishment. A retail establishment may not only sell merchandise but it may also perform services necessary to the use of such goods. Thus, in connection with its retail selling it may also render the usual servicing furnished by an establishment of a similar character. For example, the neighborhood grocery offers delivery service to its customers, and the radio dealer puts up aerials for his customers. These examples merely illustrate the general proposition as to the incidental service; and the decision in *Remington v. Shaw* (Prentice Hall Wage and Hour Service, D. C. Michigan, 1942), supports this position.

Here, by way of illustration, the service of changing and mounting tires upon the automobiles of the customers of the store and service station is a necessary adjunct to its business.

Section 13 (a) (2) of the Fair Labor Standards Act exempts either a retail or a service establishment. *Lonas v. National Linen Service Corp.*, 7 C. C. H. Labor Cases, par. 61661, C. C. A. 6th (1943); *Martino v. Michigan Cleaning Co.*, C. C. H. Labor Cases, par. 61737, U. S. D. C. Michigan (1943).

Obviously, a retail establishment rendering predominantly local and retail service incidental to its selling business is within the exemption.

2. The Respondent's Store and Service Station Qualifies as to the Sales Factors Involved in this Exemption.

The word "retail" is not defined in the Fair Labor Standards Act. Within the common, every-day business understanding in sales parlance, a retail sale means one made for consumption or use by the purchaser. Similarly, a retail business is one whose function is to sell goods or services for use and not for resale. *White Motor Company v. Littleton, supra*; *Super Cold Southwest Co. v. McBride, supra*; *Walling v. Sanders, supra.* In the absence of legislative directive it can be presumed that Congress used the term retail in this sense.

An analysis was therefore made (Ex. 2, R. 151) within the concept that a sale for consumption and not for resale, irrespective of the price and quantity involved, constitutes a retail sale.

From such analysis it appears that for the period from October 24, 1938, the effective date of the Act, up to December 31, 1940, subsequent to all employment periods in controversy, 75.2 per cent to 84 per cent of the total sales made by this store and service station were sales for consumption and not for resale—in common business parlance, retail sales.

For the same period, within the restricted interpretative rulings of the Administrator to the effect that quantity, price and use are factors which determine whether a sale is "retail" (Interpretative Bulletin No. 6) (Ex. 9, R. 160), 60.9 per cent to 71.3 per cent of the total sales made and service furnished by the store and service station were retail sales. Therefore, within either concept, more than 50 per cent of the store and service station's selling was retail sales.

3. The Administrator's Altered Administrative View Does Not Affect this Question.

Originally, the Administrator's Interpretation of April, 1940, provided that a store might be considered a retail establishment if more than 50 per cent of the dollar value of its total sales were retail sales. But establishments which sold at retail and non-retail could not be considered retail, if more than 50 per cent (dollar value) of the sales were in fact non-retail. Later, in June, 1941, the Administrator issued his Revised Interpretative Bulletin No. 6, by the terms of which the amount of non-retail sales or servicing was reduced to 25 per cent, as an administrative ruling. It should be noted that this revision of policy was effected several months after termination of all employment periods in controversy in the present litigation. To put it another way—while the petitioners were employed by the respondent, the rule was 50 per cent; once the employees had relinquished their jobs, the new official attitude was that the non-retail activities should not exceed 25 per cent. No unfair retroactive alteration of the prior interpretation of the law should be binding on these facts.

Petitioners worked for respondent while the 50 per cent ruling was in effect, and the legal incidents of their employment cannot be retroactively modified, long after they have left their jobs.

4. The Intrastate Commerce Requirements of the Retail Establishment Exemption Have Been Fully Met.

96.7 per cent of all the selling and servicing activities of respondent's store and service station was in intrastate commerce (Ex. 5, R. 152).

Respecting the interstate activity of respondent, it can be said that the interstate sales reflected in the record resulted primarily, if not wholly, from the fact that respondent's store and service station is located in Memphis, Tennessee, near the state lines of Arkansas and Mississippi.

What has been said by this Court in *Walling v. Jacksonville Paper Co., supra,* is therefore particularly applicable to the limited interstate activity of respondent:

> "It is quite clear that the exemption in Section 13 (a) (2) was added to eliminate those retailers located near the state lines and making some interstate sales." (p. 571.)

The business of the store and service station, as well as the duties of petitioners, present a definite local matter only. For this reason we are reminded that:

> "* * * Congress, in enacting this statute, plainly indicated its purpose to leave local business to the jurisdiction of the states." (*Walling v. Jacksonville Paper Co., supra,* 570.)

III. PETITIONERS WERE EMPLOYED IN AN EXEMPT LOCAL RETAILING CAPACITY.

The provisions of the Fair Labor Standards Act do not apply with respect to any employee "employed in a bona fide local retailing capacity (as such terms are defined and delimited by regulations of the Administrator)," regardless of the retail or non-retail character of the establishment. The official Administrative definition is as follows:

> "Section 541.4 *Local Retailing Capacity*—The term 'employees employed in a bona fide local retailing capacity' in Section 13 (a) (1) of the Act shall mean any employee,—
>
> (A) who customarily and regularly is engaged in,—
>
> (1) making retail sales the greater part of which are in intrastate commerce; or
>
> (2) performing work immediately incidental thereto, such as the wrapping or delivery of packages, and
>
> (B) whose hours of work of the same nature as that performed by non-exempt employees do not exceed 20% of the number of hours worked in the work-week by such non-exempt employees."

The trial court expressly found that the major part of the employment time of petitioners, as employees of respondent's store and service station, was spent in a bona fide local retailing capacity (R. 32, 45). The Court of Appeals of Tennessee, in effect, also so found (R. 193). The trial court declined to hold specifically that the petitioners were thus employed within Section 13 (a) (1) of the Act, as defined and delimited by the Administrator, although the evidence amply complied with the whole of the Administrator's regulation in this regard. The Court of Appeals of Tennessee did not consider respondent's assignment of error in that court challenging this action of the trial court, deeming further consideration of this issue unnecessary in view of the affirmance of dismissal (R. 222).

The evidence relating to petitioners' hours of work and activities may briefly be summarized. Their work-day approximated twelve hours, with every other Sunday off; and the trial court and the Court of Appeals so found (R. 32, 193). Their duties were those usually performed by automobile service-station attendants,—such as changing and mounting tires, making customer-service calls, and incidental deliveries of tires sold by the store and service station (R. 38, 44, 45, 193). The testimony of each petitioner (in narrative form in the record before this Court as prepared by their counsel), reflects no evidence of any duties performed outside the state by petitioners.

The record fails to show that petitioners' duties were related to any interstate activity of respondent's store and service station, which was barely 3.3 per cent of its over-all business. At most, about two hours of the twelve-hour day were spent by each petitioner in servicing trucks of commercial concerns and for dealer accounts, which were alleged to be non-retail activities within certain interpretative views of the Administrator. No relation to channels of commerce is shown. Therefore, even within the strict administrative views of the Administrator, more than 80

per cent of petitioners' respective employment-hours were spent in a local retailing capacity.

The Administrator's Regulation requires that the local retailing employees be regularly engaged in making retail sales predominantly intrastate or they must be regularly engaged in work incidental thereto approximately 80 per cent of the time. The evidence shows these regulatory tests have been met and thus the individual exemption applies.

In *Petway v. Dobson,* 46 F. Supp. 114, modifying 43 F. Supp. 277 (D. C. Tenn. 1942), a clerk who was mainly engaged in making retail sales in intrastate commerce was held exempt as being employed in a bona fide retail capacity, even though he was actually employed in a wholesale warehouse not within the "retail-establishment" exemption. According to the court in that case, the portion of the claimant's time spent in sweeping out the office where interstate business was done, and in unloading cars, was considered too negligible to affect his status. Similarly, *The Prescription House v. Anderson,* 42 F. Supp. 874 (D. C. Texas, 1941), decided that employees of a retail drug store were exempt, despite the fact the store was also used for manufacturing a remedy that was sold to a limited extent in interstate commerce. Another such case is *Magee v. Early & Daniel Co.* (Prentice-Hall, Wage-Hour Service, Sec. 10737; Ky. Cir. Ct. 1942), where an employee worked in a separate branch store the sales of which were wholly in intrastate commerce and practically all at retail. The court exempted the employer from the Act, remarking that it was immaterial to what extent the latter might be engaged in interstate commerce—and immaterial also whether the employee actually did a part of his work in such interstate commerce. A final illustration of the lower-court trend is indicated by *Duncan v. Montgomery Ward,* 42 F. Supp. 879 (D. C. Texas, 1941), holding that employees working in a retail warehouse maintained by the employer to supply his retail store in that city were employed in a

"local retailing capacity." (See also, *Moses v. McKesson & Robbins,* 43 F. Supp. 528; *Ellinger v. Goodyear Tire & Rubber Co.,* 40 F. Supp. 626; and *Walling v. L. Wieman Co.,* 7 C. C. H. Labor Cases, 61587 (1943) D. C. Wisc.)

It is therefore contended that the petitioners should be regarded as having been employed in a local retailing capacity. The Administrator has practically conceded this in Field Bulletin, Vol. II, No. 2 (1941), to the effect that mechanics and service men who wash, grease, or otherwise service cars are now considered to be performing work immediately incidental to the retail sale of such cars. For these reasons, the defense of respondent that petitioners ought properly to be regarded as local-retailing-employees is sustained by the record.

CONCLUSION.

We respectfully submit that, upon the law and the evidence, and for the reasons hereinbefore set forth, the petition for writ of certiorari should be denied.

Respectfully submitted,

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